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OTHER AUTHORITIES

In The

Supreme Court of the United States

October Term, 1976

No. 76-899

McGRAW-EDISON COMPANY,

Petitioner,

vs.

BETTY SOPER and JEFFSON INDUSTRIES, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

The Respondents' Brief in Opposition claims a misstatement of the facts presented in the Petition and raises the question that no issue of broad public significance is involved in this litigation.

II.

THE FACTS

The issues raised by the Petition pertain only to the application of the Sherman Act and involve only the named Respondents. The issues with respect to fraud, misrepresentation, and punitive damages (erroneously decided below, in Petitioner's opinion) are not raised here because not of such national import as to warrant the Court's attention.

The Petitioner recognizes the Court's concern is not with a review of the facts. However, while reaffirming its own statement, Petitioner questions Respondents' statement as being colored, if not distorted, to fit the version necessary for them to prevail in the Court below.

A few examples of such distortion appear in their Brief in Opposition which

misquotes the Eighth Circuit Court of Appeals on page 4;

states on page 4 that ". . . EAC (Edison Acceptance Corporation) . . . financed each of the tied sales to respondents Jeffson Industries and Betty Soper." when in fact in each sale, the Purchaser assumed existing Jacobson contracts;

states on page 7 that "Under Missouri Law a person or entity purchasing property for resale is not required to pay state sales tax. Therefore, in light of the sale-resale practice of petitioner, Jacobson was not required to pay sales tax . . ." when in fact, sales tax was paid. (Blue Ridge (later Jeffson) Appeal Appendix VI, pages D285 and D287, Gladstone (later Jeffson) Appeal Appendix VI, page D108); and Liberty Landing (later Soper) page 6 of Defendants' Exhibit DX296, the first page of which is shown at page D107 of Appeal Appendix VI.)[1]

refers throughout to the elaborate training dealers received in the use of the "assignment-assumption" agreements as selling devices and the great importance placed on their e x e c u t i o n at the time of a "resale", when in fact no mention of the agreements was made in the Jeffson sales contracts; and in the Soper sale, forms were not even requested until two months after possession had been given. (Blueridge (Jeffson), Appeal Appendix VI, Page D55; Gladstone (Jeffson), Appeal Appendix V, Page 54; Liberty Landing (Soper), Appeal Appendix VI, Page D293.)

III.

THE PUBLIC ISSUE: CAN A TRADEMARK BE A "TYING PRODUCT" UNDER THE PER SE DOCTRINE?

Respondents contend that no issue involved herein is of interest to any other than the parties to this proceeding.

The Petitioner, while reaffirming its position that the cases cited support in principle its assertion that a conflict between the Circuits exists, suggests that implicit in these issues is the assumption that a trademark can on analysis

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1 "Appeal Appendix" refers to the Appendices included in the certified transcript of the record in the Court of Appeals.

be equated to land (as in *Northern Pacific Ry. v. United States*, 356 U. S. 1) or other tangibles, be considered a "tying product", and under the *per se* rule make possible an illegal tying arrangement for which damages can be assessed without proof of an unreasonable restraint of trade.

Petitioner contends it is error to treat a trademark as a "tying product;" wrong in theory and wrong in result.

The Federal Trade Commission (in *Carvel Corp.*, (1965-1967 Transfer Binder) Trade Reg. Rep. Section 17,298 at 22,425 (FTF 1965)) held in its analysis of the economics of the Carvel franchise agreements (the same franchise situation as in *Susser v. Carvel Corp.*, 332 F. 2d 505 (2d Cir. 1964)):

> "Carvel's franchise agreements cannot be regarded as tie-in arrangements because the trademark license conceptually cannot constitute a 'tying' product and, even if it could, it could never be regarded as a separable 'product' apart from the mix and commissary items to which it is attached. . . ."

The Tenth Circuit in *Redd v. Shell Oil Co.*, 524 F. 2d 1054 (10th Cir. 1975) held:

> "The trial court was then in error in considering the trademark as a separate product sold under a tying arrangement."

The Third Circuit in *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F. 2d 1211 (3rd Cir. 1976) (cited in the Petition), a highly perceptive opinion, reversed the District Court on other grounds, but stated:

> "The district court decided however that the trademark, system and logo did constitute a separate tying product sufficient for purposes of the Sherman Act. We do not consider that decision an obvious one." and on page 1216, "Suffice it to say the matter is not free from doubt."

If a trademark is a tying product, when does it become so? At inception? or after wide advertising and promotion? Was the trademark of the McDonald hamburger chain unique when its first outlet was opened? If not, when? At inception could the Chicken Delight name have been associated with poultry feed? At what point with fried chicken?

The Eighth Circuit's decision holding a trademark to be a "tying product" results in f r u s t r a t i n g the objectives of the Sherman Act by reducing rather than increasing overall competition, and threatens the existence of a huge segment of American retailing industry if allowed to remain as a precedent.

Businesses operating under franchise agreements in 1976 accounted for an estimated $190 billion in sales of goods and services, constituting approximately 28 percent of all retail sales. Operating through 457,695 establishments, they employed an estimated 3½ million persons. (U. S. Department of Commerce *Franchising in the Economy 1974-1976.*)

Such businesses with few exceptions, use trademarks licensed by franchisors, on which their advertising and promotional efforts are based. Such trademarks are obviously under the complete control of the franchisor and are therefore automatically a "tying product" under the authority of the Eighth Circuit's decision. Their use, when conditioned on some economic restriction in the franchise agreement designed to advertise the trademark

or to compensate for the use of the trademark or to establish a uniformity between franchisees or to protect the trademark or for any other good business reason, creates a *per se* situation that exposes the franchisor to treble damages regardless of the reasonableness of the restriction.

In this case, Petitioner, selling in the highly competitive market for dry cleaning machinery, proceeded to promote and sell as a package all items necessary for an inexperienced individual to start and successfully operate a business of his own—a dry cleaning establishment. Essential to this objective was the initial "grand" opening promotion which came as a part of the package geared to the Arnold Palmer name. To protect and maintain the trademark and to provide uniformity among the various stores and to reinforce its advertising for the benefit of all the franchisees, the same sign and interior backdrop were leased as a part of each package.

The right to use the Palmer name and to receive the benefits of the promotion and advertising were included in the franchise. The sign and backdrops advertised the Arnold Palmer name and provided uniformity among the franchisees.

To hold that the license to use the Arnold Palmer name was separate and distinct from the signs and backdrop and imposed such burdensome terms in compelling the use of the signs and backdrop (as the jury was instructed, Appeal Appendix II, Page 342) as to warrant treble damages makes no economic sense.

The end effect of such improper enlargements of the Supreme Court's prior decisions is illustrated by the widely cited case of *Chicken Delight*. (*Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43 (9th Cir. 1971), *cert denied,* 405 U. S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972).)

Chicken Delight, Inc., a prosperous, viable franchise system, in business over 18 years had over 800 franchisees mostly successful whose franchises on resale were bringing $40,000.00 each. Following the decision of the Ninth Circuit in a class action suit brought by a half dozen franchisees, which held that the trademark was a tying product, the case was settled for $2,500,000.00. Out of the settlement after attorneys fees, each franchisee received less than $2,000.00 each. The result of this successful lawsuit was the end of that franchise system, the end of the franchises and the elimination of a large effective competitor in the fast food field.[2]

With effects such as these, the *per se* doctrine so extended and applied needs review and the law brought in line with experience and economic reality.

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IV.
CONCLUSION

For the foregoing reasons and for those advanced in the Petition, the writ should be granted.

Respectfully submitted,
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2 Telephone conversation with Mr. A. L. Tunick, founder of Chicken Delight, December 12, 1976.

CERTIFICATE OF SERVICE

I, William C. Ramsey, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on February 10, 1977, addressed to Joseph A. Sherman, Paul A. Wickens and Patrick Lysaught, Suite 820, Home Savings Building, 1006 Grand Avenue, Kansas City, Missouri 64106 and upon Sheridan Morgan, Two Crown Center, Suite 400, 2420 Pershing Road, Kansas City, Missouri 64108, counsel for Respondents.

WILLIAM C. RAMSEY